

Hon. Benjamin H. Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

SUSAN CURWEN,

Plaintiff,

vs.

MARK J. DYNAN; MARK W. CONFORTI;
GIERKE, CURWEN, P.S.,

Defendants.

No. 3:11-cv-05598-BHS

DECLARATION OF MARC
ROSENBERG IN OPPOSITION TO
PLAINTIFF'S MOTION TO COMPEL
DISCOVERY AND IN FURTHER
SUPPORT OF MOTION TO BRIEFLY
STAY DISCOVERY

Marc Rosenberg declares as follows:

1. I am an attorney for defendants Gierke Curwen, P.S. I am over the age of 18 years and am competent to testify as to the matters contained herein.

2. This case is companion litigation to *Gregory B. Curwen v. Mark J. Dynan, Mark W. Conforti, Gierke, Curwen, P.S.*, Superior Court of Washington in and for Pierce County, case number 11-2-12271-4 ("the Gregory Curwen case"). *See* (ECF No. 18, Ex. 2). The claims in the Gregory Curwen case are subject to contract mediation and arbitration and are not subject to a Superior Court case scheduling order. (ECF No. 18, Ex. 3). The plaintiffs in the two cases, Gregory Curwen and Susan Curwen, are husband and wife, and their claims arise out of their employment with the Firm. (ECF No. 1 at 1 ¶ 1). Mr. and Mrs. Curwen are both represented by attorney William Smart and Keller Rohrback LLP. *See* (ECF No. 1 at 7); (ECF No. 18, Ex. 2 at 15).

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1 3. Mrs. Curwen asserts claims of discrimination, retaliation, wrongful termination,
2 outrage, and breach of contract, and requests an assortment of damages. (ECF No. 1 at 4-6). It
3 is anticipated that documentation that eventually may have to be located, reviewed, and
4 produced, if the case does not settle, might be in the range of ten to twenty thousand pages of
5 records. (ECF No. 32 at ¶ 2). The parties' initial disclosures in the Susan Curwen case identify
6 thirty-five witnesses and, based on the claims and the defenses, it is reasonable to estimate
7 approximately six to eight expert witnesses will be presented in the case for all parties. *Id.*

8 4. In the Gregory Curwen case the agreements require that mediation be held
9 before the parties engage in the arbitration discovery process. (ECF No. 18, Ex. 1 at ¶ 16.3)
10 ("As a precondition of the demand for arbitration the parties agree that they shall participate in
11 a one-day, non-binding mediation of the dispute(s)"). In the Susan Curwen case, the parties
12 have, until recently, followed a similar approach and have not conducted formal discovery. In
13 order to reduce litigation costs and to reduce animosity, the parties delayed written discovery
14 and depositions in the Susan Curwen case as well as in the Gregory Curwen case. The parties
15 recognized it was best in these cases to first try to resolve the claims rather than to litigate the
16 claims and perhaps further polarize the parties' positions.

17 5. It has taken the parties a considerable amount of time to agree on a mediator and
18 a mediation date. (ECF No. 32 at ¶ 4). There are voluminous emails and correspondence on
19 these issues in the two cases that could be submitted to support this proposition, but the Firm
20 chooses not to flood the Court with documents. The parties recently agreed Judge Terrence
21 Carroll (retired) will act as the mediator of the claims, and the mediation date is May 8, 2012.
22 *Id.* The parties recently agreed that the arbitrator for the Gregory Curwen case will be Judge
23 Steven Scott (retired). *Id.* Then, almost immediately following these agreements, Plaintiff
24 served her first formal discovery.

1 6. On March 15, 2012, Plaintiff served our office with two Notice of Videotaped
2 30(b)(6) deposition of Gierke, Curwen, P.S., one in Susan Curwen's case, (ECF No. 32, Ex. 1),
3 and one in Gregory Curwen's case. Ex. 1.¹ The Greg Curwen notice lists thirty-three subjects
4 on which the designated witness(es) is directed to testify. *Id.* The notices also directs our
5 client to produce documents as to each of these categories, citing Rule 30(b)(2). *Id.* No
6 Request for Production was served on the Firm. The location, accumulation, and review of
7 such records would take a considerable amount of time for the employees and attorneys, and
8 result in disruption to the work of the defendant law firm, in addition to expenditure of
9 significant legal fees by all parties. (ECF No. 32 at ¶ 6).

10 7. On March 22, 2012, in order to facilitate informal discovery in preparation for
11 mediation, our office signed a CR 2A agreement, on behalf of the client, at the request of
12 Plaintiff, to permit experts to obtain and share the Firm's financial records. Ex. 2.

13 8. On March 23, 2012, our office sent Plaintiff a letter indicating the parties should
14 agree to informal discovery sufficient to make mediation meaningful. Ex. 3. The Firm
15 requested Plaintiff to strike the Rule 30(b)(6) depositions, and proposed that the parties jointly
16 move to request a brief continuance in the case to permit the parties sufficient time to engage in
17 mediation without extensive discovery and, at the same time, have sufficient time to prepare for
18 trial of settlement was not accomplished. *Id.*

19 9. On March 26, 2012, our office again reached out to Plaintiff with a letter that
20 provided a draft motion to amend the case scheduling order and briefly stay discovery. Ex. 4.
21 Our office requested that the parties work together to come to an agreement so as not to have to
22 bring the issue before the court. *Id.*

23
24
25 ¹ All exhibits cited to herein are attached to this declaration unless otherwise noted.

1 10. March 27, 2012, Plaintiff sent us an email that notes that we had already agreed
 2 to provide its outside financial records to Plaintiff's expert, and proposes that we provide
 3 Plaintiff "with documents relating to categories 12-17 and 22-30 in our 30b6 notice." Ex. 5.
 4 Only the Greg Curwen deposition notice had categories going up to 30, as the Susan Curwen
 5 notice had 22 categories. Counsel for the Parties later discussed some of these discovery
 6 categories telephonically and were working toward a hopeful resolution.

7 11. On March 29, 2012, Joel Wright at our office indicated to Plaintiff's counsel
 8 Will Smart that a letter was going to be provided that day outlining the informal discovery that
 9 it was willing to provide for purposes of the mediation. We indicated that we would file our
 10 motion to stay discovery in order to protect itself against the burdensome pre-mediation
 11 discovery sought by Plaintiff, but that we might strike the motion if an agreement could be
 12 reached based on its coming letter. The letter was provided to Plaintiff at 3:04 PM. Ex. 6.

13 12. In its March 29, 2012 letter, our office indicated that we were willing to provide
 14 the following categories of documents prior to the mediation in both cases: employment files
 15 for Greg and Susan Curwen (## 3-4); Susan Curwen's employment contract (#9), the Firm's
 16 policies in regard to discrimination claims (#10); to the extent available, statements and emails
 17 by Mark Dynan or Mark Conforti regarding Greg or Susan Curwen and Greg Curwen (## 12-
 18 15); and financial documents (## 20-21). The Firm also indicated that it would informally
 19 producer corporate documents and documents related to Greg Curwen's retirement (## 22-30),
 20 if the Curwen's would in turn provide correspondence between Gregory Curwen and Gary
 21 Branfeld regarding any aspect of the law firm's business or corporate governance; and all
 22 documentation in support of the Curwens' claims in relation to damages. We are unwilling to
 23 provide: (1) the employee files of non-parties to this litigation based on privacy rights of the
 24 non-party employee (#16), and (2) a copy of its hard drives, as they contain an immense
 25 amount of documents related to our client's clients that are attorney-client privileged, and

1 responding to the request would be over-burdensome in both the time of responding and the
 2 cost of providing any relevant documents, which could be obtained through more targeted
 3 requests. Ex. 6. Almost immediately following reception of this letter, Plaintiff filed the
 4 Motion to Compel Discovery. (ECF No. 30).

5 13. We also filed a motion to amend the case scheduling order and briefly stay
 6 discovery until after the May 8, 2012 mediation. (ECF No. 29, 32). We request that the Court
 7 deny Plaintiff's motion to compel discovery and grant our client's motion to amend the case
 8 scheduling order and briefly stay discovery until after the May 8, 2012 mediation.

9 14. The attached exhibits are true and correct copies of the originals.

10 **Exhibit 1:** 30(b)(6) deposition notice

11 **Exhibit 2:** Stipulation Regarding Documents

12 **Exhibit 3:** Letter dated March 23, 2012

13 **Exhibit 4:** Letter dated March 26, 2012

14 **Exhibit 5:** Email dated March 27, 2012 at 4:08 PM

15 **Exhibit 6:** Letter dated March 29, 2012

16 **Exhibit 7:** Plaintiff's First Interrogatories and Requests for Production

17 I declare under penalty of perjury under the laws of the State of Washington, that the
 18 foregoing is true and correct.

19 DATED April 6, 2012.

20 LEE SMART, P.S., INC.

21 By: s/ Marc Rosenberg

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24 Of Attorneys for Defendants
 25 Gierke Curwen, P.S.